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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1064

ROBERT M. WENDLINGER,
Petitioner,

vs.

HARDWARE MUTUAL CASUALTY COMPANY,
A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETER Q. NYCE,
THOMAS A. WILLIAMS,
L. C. O'CONNOR,
JOHN W. FUBSELL,
Counsel for Petitioner.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Robert M. Wendlinger, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit entered in this case on the 26th day of December, 1944.

A

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on the 26th day of December, 1944 (R. 63). The

jurisdiction of this Court is invoked under Section 240-A of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A., Section 347(a).

B

Statement of the Matter Involved

Robert M. Wendlinger, the petitioner, recovered a judgment for $4500.00 against Mildred Barbee, in the Hustings Court, Part II of the City of Richmond, for injuries sustained in an automobile accident, which occurred in the City of Richmond on October 21, 1942 (R. 10). The Hardware Mutual Casualty Company, a corporation of the State of Wisconsin, had issued, in that state, and in force a policy of insurance covering the automobile which injured the petitioner (R. 11-14D). This policy denominated an "Automobile garage liability policy", was delivered to J. W. Ramsey and Duncan Barbee, d/b/a, Ramsey and Barbee address, North 5th Street, Auburn, Sangamon County, Illinois, the location of the insured premises being the same. Ramsey and Barbee, the insured, were partners conducting a garage business at the time the policy in question was issued. Attached to the policy was an "additional interests endorsement" for which a separate premium was paid as shown thereon. Subsequently, while the policy was in force, Barbee and Ramsey agreed that Ramsey continue to conduct the business of the partnership at that location, and that Barbee would seek employment elsewhere temporarily. Under this arrangement, Barbee was to draw no salary from the business, but would share in any net profits accruing to the partnership, after payment of a salary to Ramsey, and payment of operating expenses, thus retaining his status as a partner (R. 31).

Pursuant to this agreement, Barbee took one of the automobiles owned by the partnership, and drove it to Virginia,

where he procured employment as a civilian mechanic instructor at Camp Lee, Virginia.

He leased an apartment in Richmond, Virgina and lived there with his wife for a period of about 6 months, after which time he returned to Auburn, Illinois, and resumed his active participation in the partnership.

While Barbee was employed at Camp Lee, he used this automobile to travel back and forth between Richmond and Camp Lee, and both he and his wife used the automobile, generally for pleasure purposes.

On the night of October 31, 1942, Mrs. Barbee, while operating the automobile, with the consent of the named assured, Barbee and Ramsey, en route with her household laundry to the apartment she and Barbee were occupying, ran down and injured the petitioner.

Upon trial of the action instituted by the petitioner in the District Court of the United States for the Eastern District of Virginia against Hardware Mutual Casualty Company, the District Judge directed a verdict in favor of the petitioner. On appeal, the Circuit Court of Appeals, for the fourth Circuit reversed the District Court and directed judgment for the Hardware Mutual Casualty Company. The Circuit Court thereby refusing to give effect to the insuring agreement which was "to pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, * * * because of bodily injury, sustained by any person or persons caused by accident and arising out of such of the operations hereinafter defined, * * *."

These operations covered by the policy were defined as follows:

Div. 1—*Automobile dealer or repair shop*, the ownership, maintenance, occupation or use of the premises herein designated including the public ways immediately adjoining,

for the purpose of an automobile dealer or repair shop, and all operations either on the premises or elsewhere, which are necessary and incidental thereto, including repairs of automobiles, or their parts and ordinary repairs of buildings on the premises and the mechanical equipment thereof and the ownership, maintenance or use of any automobile for any purpose in connection with the above defined operations, and *also for pleasure use*. (Italics *ours*) The policy further provided that its provisions covered any one operating the automobile with the consent of either of the named insured.

C

Question Presented

Whether or not the clause contained in the policy "*and also for pleasure use*" and the clause contained in the additional interests endorsement "for pleasure purposes", mean pleasure purposes as generally understood, or the narrow and restricted interpetation, placed thereon by the Circuit Court of Appeals.

D

Reasons Relied On for Allowance of Writ

1. The United States Circuit Court of Appeals for the fourth Circuit has decided an important question of law, which has not been, but should be settled by this Court and has decided the same in a way in conflict with applicable decisions of this and other Courts and has construed coverage of a policy of automobile liability insurance rigidly in favor of the insurer, rather than liberally in favor of coverage of the insured, contrary to all leading authorities on the question.

2. The question presented here is of general interest as thousands of these and similar liability policies of insur-

ance are in effect throughout the country. A supporting brief accompanies this petition.

Wherefore your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals, for the fourth Circuit entered by that court on the 26th day of December, 1944, and said judgment reversed by this Honorable Court, and that your petitioner may have such other and further relief as this Honorable Court may deem proper.

PETER Q. NYCE,
THOMAS A. WILLIAMS,
L. C. O'CONNOR,
JOHN W. FUSSELL,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1064

ROBERT M. WENDLINGER,

Petitioner,

vs.

HARDWARE MUTUAL CASUALTY COMPANY, A CORPORATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions of Courts Below

The opinion of the United States Circuit Court of Appeals, Fourth Circuit, has not been officially reported, but may be found in the R. page 54. The opinion of the District Court of the United States for the Eastern District of Virginia, appears on page 49 of the R., and its final judgment on page 50 of the R.

II

Jurisdiction

The jurisdiction of this case is invoked under Section 240-(a) of the Judicial Code, as amended, 28 U. S. C. A., Section 347 (a). The judgment of the United States Cir-

cuit Court of Appeals, Fourth Circuit to be reviewed was entered on the 26th day of December, 1944 (R. 63).

III

Statement of the Case

A statement of the case appears under heading "B" of the petition for writ of certiorari. In the interest of brevity, it is not now repeated, but is referred to with the request that it be considered as herein incorporated by reference.

IV

Question Presented

The question specifically brought forward by the petition for writ of certiorari appears under heading "C" of the petition, and for the sake of brevity is not now repeated but referred to with the request that it be considered as herein incorporated by reference.

V

Argument

Policy Misconstrued

The Circuit Court of Appeals for the Fourth Circuit, violated the well established rule that insurance policies must be construed strictly against the insurer, and in favor of the insured (see *Midwest Dairy Corp.* v. *Ohio Ins. Co.*, 356 Ill. 389; and *Aschenbrenner* v. *U. S. F. & G. Co.* 292 U. S. 80).

And it failed to give any force or effect to the rider attached to the policy denominated "additional interest endorsement". The policy of insurance was a printed standard form containing the usual "exclusion" clause and be-

cause of the fact that the partnership had two pleasure type automobiles, each partner used one for his own purposes (R. 31-32), the "additional interests endorsement" was attached to the policy. This endorsement provided that the insurance be extended to cover operations for pleasure purposes in the following language:

> "* * * Such insurance * * * applies * * * to any other person, or organization as insured, provided: the insurance applies only if the named insured's operations are classified as 'automobile dealer or repair shop', and only with respect to the use, for such business operations *or for pleasure purposes*, italics (*ours*) of any automobile covered under such classification * * * all other conditions and provisions remain unchanged."

The purpose and effect of this endorsement was to change or nullify the "exclusion" provisions of the policy limiting the insurance coverage to operations in connection with the business. In other words, to suit the needs of the parties, the terms of the policy were expressly changed to cover operations "for pleasure purposes of any automobile covered under such classification". No limitation or restriction of any nature whatsoever was placed upon operation of any automobile for pleasure purposes. The Supreme Court of the State of Wisconsin, in which state the policy we are here dealing with was issued, has construed the point at issue in the case of Catherine Culver, respondent vs. T. B. Webb, d/b/a Webb Auto Sales, etc. 12 N. W. (2nd) page 731 (Wisconsin) at 735 and 736.

> "We now come to a question concerning the insurance coverage that presents substantial difficulties. On November 29, 1940, defendant Insurance Company issued to T. B. Webb, d/b/a Webb Auto Sales, what is denominated 'Garage Liability Policy' (National Standard Garage Liability Policy) * * * the insurer agrees to pay all sums which the insured shall

> become obligated to pay by reason of * * * the ownership, maintenance, occupation, or use of the premises herein designated, including the public ways immediately adjoining, for the purpose of an automobile dealer or repair shop, and all operators either on the premises or elsewhere which are necessary and incidental thereto, including repairs of automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the ownership, maintenance, or use of any automobile for any purpose in connection with the above defined operations and also for pleasure use."

This policy likewise included the exclusion clause that the Circuit Court of Appeals for the Fourth Circuit based its opinion on, that this honorable Court is asked to review, the terms of which clause are identical namely:

> "This policy does not apply * * * to the ownership, maintenance, or use for pleasure purposes of any automobile not owned by or in charge of the named insured, for use principally in such operations."

Continuing, the Court said: at 736,

> "In this case, the Insurance Company, by including a coverage of the owner of the garage for pleasure purposes has introduced into a standard garage policy the essential features of those policies which, under Section 204.30 (3) are required to include the omnibus coverage clause. * * * By assuming to insure Webb against liability arising out of the operation of his car for pleasure, the insurer, to the extent of this obligation has created a 'privately owned car policy' * * * Culver was an additional assured under the policy and within the limits of the policy, he is entitled to coverage as such assured."

Pleasure Purposes

The construction of the phrase "for pleasure purposes" placed by the Circuit Court of Appeals, nullifies and sets at

naught the additional interest endorsement, and renders that endorsement meaningless. To limit as the Circuit Court of Appeals did the term "for pleasure purposes" to operations of the garage creates an anomalous and absurd situation and this is well pointed out in the case of *Georgia Casualty* v. *Waldman*, 53 Federal (2), Page 24 at Page 25:

> "Taking up first the question of use, appellant's contention that the business and the pleasure of the corporation alone is meant, is untenable. The corporation could have no pleasure and applied to the corporation only, that term of the contract would be meaningless. If use in the corporate business alone is meant the broad provision for the protection of all persons who use the automobile with permission would be largely useless and in-operative."

Moreover, the Circuit Court of Appeals for the Fourth Circuit placed a different construction on similar language in a garage liability policy in the case of *Newton* v. *Employers Liability Assurance Corporation*, 107 Federal (2nd) 164.

> "From an examination of the policy and the declarations attached thereto, it is apparent that the policy was intended to cover the ownership or maintenance or use of any automobile for any purpose, usual to the assured's operations in the business of auto sales at 225 No. Allen Street, Albany, New York, including private pleasure use * * * if the evidence * * * establishes that the car * * * was being driven * * * with the permission of Englert (the insured) either upon his business in connection with the Albany Sales Office, *or for private pleasure, the policy covers.*"

If the defendant in this case desired or intended to restrict the use of this automobile for pleasure, it could have and should have so stated in the policy. However, it was evidently not the intention of the parties to so restrict its

use. This is apparent not only from the fact that no such restrictions are stated in the policy, but also from the fact that such limitations of use would not have served the purposes of the parties in that the records shows that a Mr. Duncan and Mr. Barbee were partners, owning two pleasure type automobiles and these partnership cars were included for a flat charge so that the owner of these pleasure type cars would have insurance protection, not only while at or in the garage that they operated, but as any other individual owner of an automobile.

Partnership Not Dissolved

The Circuit Court of Appeals for the Fourth Circuit further erred in treating this case as though the partnership had been dissolved. The partnership had not been dissolved. On the contrary, it continued to function and its status as a partnership was the same at the time the accident occurred as it was when the policy was written, except that one of the partners, Barbee, took employment elsewhere and relinquished his salary from the business while away, but not his share of the profits, so that the relationship between the insurer and the insured as a partnership remained the same.

No Territorial Limitation

The fact that the accident out of which this litigation grows, happened in Virginia rather than in Illinois, the place of residence of the insured, does not destroy the insurance coverage of the car in question, for there is no territorial limitation contained in the policy, but on the contrary it expressly recites that it applies to "accidents which occur during the policy period within the United States of America, Canada, or Newfoundland."

Conclusion

In conclusion, counsel for the petitioner respectfully submit that for the reasons herein set forth, a writ of certiorari should be granted the petitioner, and that this court should review and reverse the decision of the United States Circuit Court of Appeals for the Fourth Circuit.

Respectfully submitted,

PETER Q. NYCE,
THOMAS A. WILLIAMS,
L. C. O'CONNOR,
JOHN W. FUSSELL,
Counsel for Petitioner.

(6999)

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vs.

HARDWARE MUTUAL CASUALTY COMPANY, A CORPORATION, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO MOTION AND PETITION FOR WRIT OF CERTIORARI

HUNTON, WILLIAMS, ANDERSON, GAY AND MOORE,
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THOMAS B. GAY,
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Richmond, Virginia,
April 6, 1945.

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BRIEF OF RESPONDENT IN OPPOSITION TO MOTION AND PETITION FOR WRIT OF CERTIORARI

I.

INTRODUCTORY STATEMENT

Robert M. Wendlinger recovered judgment in the principal sum of $4500.00 against Mildred Barbee in Hustings Court, Part II, of the City of Richmond, Virginia, on July 30, 1943, for personal injuries he sustained by reason of the negligent operation of an automobile by Mildred Barbee in the said City of Richmond on October 31, 1942.

Robert M. Wendlinger later instituted this civil action in the aforesaid Court to enforce payment by Hardware Mutual Casualty Company of the aforesaid

judgment under the terms of an "Automobile Garage Liability Policy" issued by the Company to "J. W. Ramsey and Duncan Barbee, D/B/A Ramsey and Barbee, North Fifth Street, Auburn, Sangamon County, Illinois", where they conducted the business of an "Automobile Dealer or Repair Shop".

The action was removed by respondent Hardware Mutual Casualty Company to the United States District Court for the Eastern District of Virginia at Richmond, and trial by jury was had on the 14th day of November, 1944.

Respondent defended the action upon the ground that under the terms of its policy respondent was liable for injuries occasioned by an automobile when owned and operated by the named insured, and for injuries occasioned by an automobile owned by the named insured and operated by another with the consent of the named insured *only* when such automobile was used principally for "Automobile Dealer or Repair Shop" purposes *at the specified location* in Auburn, Illinois, or for pleasure purposes incident to *such* use at *that* location.

The facts were not disputed at the jury trial, and after all testimony had been introduced, both parties moved for a directed verdict. The District Court sustained the plaintiff's motion and directed a verdict in favor of the plaintiff; and the jury accordingly returned a verdict of $4500.00 for the plaintiff.

Respondent Hardware Mutual Casualty Company moved to set aside the verdict and for entry of final judgment in favor of respondent, but the Court overruled the motion and on the 19th day of June, 1944, entered final judgment upon the verdict for the plaintiff (R 50).

Respondent Hardware Mutual Casualty Company moved to set aside the judgment, but the Court over-

ruled that motion. Respondent appealed to the United States Circuit Court of Appeals, Fourth Circuit; and on the 26th day of December, 1944, that Court reversed the judgment of the District Court and directed entry of judgment for the defendant Hardware Mutual Casualty Company in the District Court. The decision of the Circuit Court of Appeals is reported as *Hardware Mut. Casualty Co.* v. *Wendlinger,* 146 Fed. (2nd) 984.

Robert M. Wendlinger will hereinafter be designated sometimes as the plaintiff and sometimes as petitioner, and Hardware Mutual Casualty Company will hereinafter be designated as the respondent.

References are to the printed record accompanying the Petition for Writ of Certiorari. *Italics* are supplied unless otherwise stated.

II.

STATEMENT OF FACTS

1. Respondent's policy No. 223706 (R 14A-14D) was issued on July 28, 1942, with "Additional Interests Endorsement" effective for one year from August 21, 1942. Under "Declarations" the policy insured "J. W. Ramsey and Duncan Barbee, D/B/A Ramsey and Barbee, North Fifth Street, Auburn, Sangamon County, Illinois" (R 14A), against liability for personal injury ($10,000.00 each person; $20,000.00 each accident) and property damage ($5,000.00 each accident) to others (R 14A). Under the "Additional Interests Endorsement" (R 11-14) the policy also protected "any other person" as "insured" "if the named insured's operations are classified as 'automobile dealer or repair shop' and *only* with respect to the use, for such business operations or for pleasure purposes, of any automobile *covered* under such classification".

2. The insured's operations were classified under Item 4 of the "Declarations" (R 14A) of the policy as "Automobile Dealer and Repair Shop" within the meaning of the "Additional Interests Endorsement" above mentioned; and "Coverage A", in respect to "Bodily Injury Liability", obligated the Company (R 14B):

> "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident *and arising out of the operations hereinafter defined as are indicated by specific premium charge or charges in Item 4 of the "Declarations".*

3. The estimated advance premium charged of $117.44 was stated in Item 4 of the "Declarations" to be based upon an estimated annual payroll of the "Automobile Dealer and Repair Shop" operated by the named insured of $8,000.00 (R 14A). "Definition of Operations", "Division 1", of the policy regarding "Automobile Dealer or Repair Shop" is as follows:

> "The ownership, maintenance, occupation or use of the *premises herein designated,* including the public ways immediately adjoining, *for the purpose of an automobile dealer or repair shop,* and all operations either on the premises or elsewhere *which are necessary and incidental thereto,* including repairs of automobiles or their parts, and ordinary repairs of buildings on the premises and the mechanical equipment thereof; and the ownership, maintenance or use of any automobile *for any pur-*

pose in connection with the above defined operations, and also for pleasure use".

4. Under "Exclusions" "(b)" the policy excluded from coverage under the foregoing "Definition of Operations", "Division 1", the "ownership, maintenance or *use for pleasure purposes of any automobile not covered by or in charge of the named insured for use principally in such operations"* (R 14B).

5. About August 10th, 1942, some ten days after the policy sued upon was issued to Messrs. Ramsey and Barbee, Duncan Barbee arrived in Petersburg, Virginia; and about a week later he took up residence at No. 1113 Grove Avenue, Richmond, Virginia (R 30), having obtained work as an instructor at Camp Lee, Virginia (R 30). Barbee drove from Auburn, Illinois, to Richmond in a 1942 Chevrolet sedan owned by Ramsey and Barbee, and brought his wife, Mildred Barbee, with him (R 30). It had been agreed between the partners that Ramsey would continue to conduct the automobile business at Auburn, Illinois, Barbee relinquishing his salary while away, but not his share of the profits from the business, and that he would return at any time if needed (R 31). Counsel for petitioner are in error when they state in their Petition (P. 2) that Barbee and Ramsey agreed "that Barbee would seek employment elsewhere *temporarily*". Their agreement was that Barbee would seek employment elsewhere indefinitely.

6. Barbee rented out his residence in Auburn, Illinois (R 31), leased an unfurnished apartment at No. 1113 Grove Avenue, Richmond, Virginia (R 32, 34, 40, 41, 48A), for a term of one year, and bought furniture for it (R 32). He resided there with his wife until his return to Auburn, Illinois, in February, 1943 (R 30-32). After arriving in Virginia, Barbee and his wife used the 1942

Chevrolet sedan "for everything you would normally use a car for" (R 32). On the night of October 31, 1942, Mrs. Barbee ran down and injured petitioner, Robert M. Wendlinger, in Richmond while she was driving the automobile with the consent of her husband (R 16).

7. The business of Ramsey and Barbee in Auburn, Illinois, improved to such an extent that Ramsey requested Barbee to return to the business, and Barbee accordingly resigned his employment at Camp Lee and returned to Auburn, Illinois, in February, 1943 (R 31).

8. Petitioner, Robert M. Wendlinger, instituted his action as aforesaid against Mildred Barbee in Hustings Court, Part II, of the City of Richmond, and recovered judgment of $4500.00 against her. Execution upon that judgment having been returned unsatisfied, petitioner instituted this action to enforce payment by respondent under the terms of its policy issued as aforesaid.

III.

THE ISSUE PRESENTED

Counsel for petitioner erroneously state in their Petition (p. 4) that the question presented is "whether or not the clause contained in the policy '*and also for pleasure use*' and the clause contained in the additional interests endorsement '*for pleasure purposes*', mean pleasure purposes as generally understood, or the narrower and restricted interpretation, placed thereon by the Circuit Court of Appeals". (Italics by Petitioner).

To the contrary the facts demonstrate that the real issue presented is whether under the terms of the policy respondent is liable for injuries occasioned by an automobile owned by the named insured and operated by another with the consent of the named insured *only* when

such automobile is used principally for "Automobile Dealer or Repair Shop" purposes *at the specified location in Auburn, Illinois,* or for pleasure purposes incident to *such* use at *that* location.

IV.

ARGUMENT

The Petition Contains Unwarranted Statements

The Petition (P. 4) asserts that "the United States Circuit Court of Appeals for the Fourth Circuit has decided an important question of law which has not been, but should be settled by this Court and has decided the same in a way in conflict with applicable decisions of this and other Courts, and has construed coverage of a policy of automobile liability insurance rigidly in favor of the insurer, rather than liberally in favor of coverage of the insured, contrary to all leading authorities on this question".

Actually the opinion of the Court shows that the Court has correctly applied familiar principles of insurance law; *Hardware Mut. Casualty Co.* v. *Wendlinger,* 146 Fed. (2nd) 984.

The Petition (P. 4) asserts that "the question presented here is of general interest as thousands of these and similar liability policies of insurance are in effect throughout the country"; but there is nothing in the record to warrant any such statement.

Insurance Policies Are Construed in Favor of the Insured

Respondent admits that insurance policies must be construed strictly against the insurer and in favor of the

insured, as was held in *Midwest Dairy Corp.* v. *Ohio Insurance Co.,* 356 Ill. 389, 190 N. E. 702, and in *A. S. Chenbrenner* v. *U. S. Fidelity & Guaranty Co.,* 292 U. S. 80, which are cited for petitioner in support of the proposition which is conceded; but in this case (*Hardware Mut. Casualty Co.* v. *Wendlinger,* 146 Fed. (2nd) 984, 989) the Circuit Court of Appeals for the Fourth Circuit has said:

> "As heretofore indicated, we find no ambiguity in the policy sued on in this case."

Petitioner Cannot Recover Under the Additional Interests Endorsement

Counsel for petitioner argue that the Circuit Court of Appeals for the Fourth Circuit violated the rule that insurance policies must be construed strictly against the insurer and in favor of the insured, and that the Court failed to give any force or effect to the "Additional Interests Endorsement" attached to the policy; but the very words of that endorsement exclude coverage in this case.

To support their argument, counsel for petitioner cite *Culver* v. *Webb,* 244 Wis. 478, 12 N. W. (2d) 731; but the Circuit Court of Appeals for the Fourth Circuit analyzed that case in its opinion in the case at bar. After discussion of *Newton* v. *Employers Liability Assurance Corp., Ltd.,* Fourth Circuit, 107 Fed. (2d) 164, where the insurer was held liable on a garage public liability policy when the plaintiff was injured in Norfolk, Virginia, by an automobile driven by a salesman employed by the insured, the Court said in the case at bar; *Hardware Mut. Casualty Co.* v. *Wendlinger,* 146 Fed. (2d) 984, 987:

"* * * The question here is whether the automobile is covered by the garage policy at all; and, because it is not covered, questions as to the applicability of the omnibus coverage clause do not arise. And in Culver v. Webb, 244 Wis. 478, 12 N.W. 2d 731, the defendant insurer was again held liable on a similar garage policy which did contain the exclusion clause like the one in the instant case, but the facts did not bring the clause into play and it was apparently not invoked by the defendant. In other cases involving garage policies, similarly if not identically worded, where the facts showed that the automobile causing the injury was not being used in connection with the described garage operations, the insurer was held not liable. Barrett v. Employers Liability Assur. Corporation, 5 Cir., 118 F. 2d 799; Lavine v. Indemnity Ins. Co., 260 N.Y. 399, 183 N.E. 897; Hardware Mut. Casualty Co. v. Higgason, 175 Tenn. 357, 134 S.W. 2d 169; Maas v. Harvey, 200 La. 736, 8 So. 2d 683."

Counsel for petitioner argue that construction of the phrase "for pleasure purposes" by the Circuit Court of Appeals for the Fourth Circuit nullifies the "Additional Interests Endorsement" of the policy; and in support of their argument, counsel for petitioner cite *Georgia Casualty Co.* v. *Waldman*, 53 Fed. (2nd) 24. That case, however, has no pertinency to the issue in the instant case. It decided, in construing the provisions of a policy extending coverage to any other person while operating a private passenger type automobile "for pleasure and business purposes" that the language quoted was broad enough to cover pleasure operations of such other person when an individual, although the named insured was a corporation and obviously could not engage in pleasure driving. It also affirmed the decision of the trial court that, on the facts of the case, the automobile was

shown to have been driven by the operator at the time of the accident with the consent of the named insured. Neither issue is involved in the instant case. Mrs. Barbee was admittedly driving the automobile owned by Ramsey and Barbee with the consent of her husband, Duncan Barbee, and the use to which she was putting it was at most a pleasure use within the meaning of that *term* as employed by the policy. It was not, however, such a pleasure *use* as was covered by the provisions of the policy at the time of the accident.

In the case at bar the "Additional Interests Endorsement" was attached to the policy for the purpose of extending its coverage, under certain conditions, to two classes of persons other than the named insured, that is (1) to any employee of the named insured, and (2) to any other person or corporation provided that, as to the latter class, "the named insured's operations are classified as 'automobile dealer or repair shop' and only with respect to the use, for such business operations or for pleasure purposes, of any automobile covered under any such classification". Under the terms of the endorsement "all other conditions and provisions (of the policy) remain unchanged" (R 12-14).

The Petition erroneously asserts (P. 9):

> "The purpose and effect of this endorsement was to change or nullify the 'exclusion' provisions of the policy limiting the insurance coverage to operations in connection with the business. In other words, to suit the needs of the parties, the terms of the policy were expressly changed to cover operations 'for pleasure purposes of any automobile covered under such classification'. No limitation or restriction of any nature whatsoever was placed upon operation of any automobile for pleasure purposes."

Actually the "Additional Interests Endorsement" does no such thing when read in the light of the "other conditions and provisions" of the policy which are stated in such endorsement to "remain unchanged". Under its provisions relating to "Exclusions" it is expressly stated that the policy does not apply to the "use for pleasure purposes of any automobile not owned by or in charge of the named insured for use principally in such (automobile garage and repair shop) operations" (R 14B). The automobile involved in the instant case was not being so used at the time of the accident. It was being used by Mr. and Mrs. Barbee "for everything you would normally use a car for" when operated in connection with their residence in Richmond, Virginia, and Mr. Barbee's employment as an instructor at Camp Lee, Virginia.

The Circuit Court of Appeals for the Fourth Circuit Has Ruled Consistently

Counsel for petitioner argue that the Circuit Court of Appeals for the Fourth Circuit placed a different construction on similar language in a garage liability policy in *Newton* v. *Employers Liability Assur. Corp.*, 107 Fed. (2nd) 164.

But the Newton case involved a determination of a question whether under Section 4326(a) of the Virginia Code an insurance company was liable for injuries occasioned to a third person by an automobile when operated by a person other than the insured, and under circumstances for which the owner would not be held responsible. The Circuit Court of Appeals for the Fourth Circuit held the language of the statute was broad enough to impose such liability if the automobile was being operated by such third person with the per-

mission, express or implied, of the owner, although the owner would not have been liable under the circumstances.

No Question of Partnership Dissolution Is Presented

Counsel for petitioner erroneously assert that the Circuit Court of Appeals for the Fourth Circuit erred in treating this case as though the partnership between Ramsey and Barbee had been dissolved, for there is nothing in the opinion of the Court to warrant any such assertion. The question before the Court is whether or not the automobile by which Wendlinger was injured was then being used for "Automobile Repair Shop Purposes" *at the specified location* in Auburn, Illinois, or for pleasure purposes incident to *such* use at *that* location so as to render the insurer liable; and the Court held the automobile was not being so used when Wendlinger was injured.

No Question of Territorial Limitation Is Presented

Counsel for petitioner assert that "the fact that the accident out of which this litigation grows, happened in Virginia, rather than in Illinois, the place of residence of the insured, does not destroy the insurance coverage of the car in question, for there is no territorial limitation contained in the policy, but on the contrary it expressly recites that it applies to 'accidents which occur during the policy period within the United States of America, Canada, or Newfoundland' ".

The provision of the policy limiting its coverage to accidents which occur during the policy period within the United States of America, Canada, or Newfound-

land is of a general nature and is obviously intended to make its printed provisions, as a policy form, applicable anywhere in the territory designated. It was manifestly not intended *to extend the coverage of a particular policy* to the entire continental United States in view of the language of the policy under review relating it to the "automobile dealer or repair shop" of J. W. Ramsey and Duncan Barbee D/B/A Ramsey and Barbee, conducted at North Fifth Street, Auburn, Sangamon County, Illinois, and the provisions of the "Additional Interests Endorsement" to the same effect. In this connection the Circuit Court of Appeals for the Fourth Circuit in its opinion said (*Hardware Mut. Casualty Co.* v. *Wendlinger,* 146 Fed. (2nd) 984, 988):

> "(4) Counsel for the appellee also refers to the printed provision of the policy which reads: 'This policy applies only to accidents which occur during the policy period within the United States of America, Canada, or Newfoundland.' This is a very customary provision in automobile policies. It, of course, applies to accidents resulting from the use of any automobile included in the policy; but it obviously does not apply to accidents arising from the use of an automobile not within the coverage of the policy. Lavine v. Indemnity Ins. Co. 260 N.Y. 399, 183 N.E. 897."

The Theory of the Respondent

Respondent contends that at the time of the accident resulting in petitioner's injuries on October 31, 1942, the automobile of Ramsey and Barbee, then being operated by Mildred Barbee in Richmond, Virginia, was not covered by the policy sued upon for the reason that it was not then being used *principally* for "Automobile Dealer or Repair Shop" purposes at the specified loca-

tion at Auburn, Illinois, or for pleasure purposes incident to *such* use at *that* location.

The automobile was being used by Mrs. Barbee in Richmond, Virginia, at most for a "pleasure" purpose within the meaning of that *term* as used in the policy. The policy did not, however, cover use for pleasure purposes unless the automobile in question was then "owned by or in charge of the named insured (Ramsey and Barbee) for use *principally* in *such* (Automobile Dealer or Repair Shop) operations". Paragraph (b) of the "Exclusions" clause of the policy expressly so provides.

If Barbee had been operating the automobile at the time of the accident in connection with an "automobile dealer and repair shop" which he or his firm was then conducting in Richmond, Virginia, no recovery could have been had since the coverage was confined to such operations when conducted at their stated place of business in Auburn, Illinois. *Lavine* v. *Indemnity Insurance Co. of North America*, 260 N.Y. 399, 183 N.E. 897, cited with approval on another point by the Circuit Court of Appeals for the Fourth Circuit in *Newton* v. *Employers Liability Assurance Corp.*, 107 Fed. (2d) 164.

Similarly, if Barbee had been transporting the family laundry to his place of residence in Richmond when the accident occurred, no recovery could have been had since the policy expressly states that it does not apply to "use for pleasure purposes" of any automobile not owned by, or in charge of the named insured, for use *principally* in such (automobile dealer or repair shop) operations. Barbee had kept the automobile in question in Richmond since August 10th, more than two and one-half months before the accident, and did not return to Auburn, Illinois, with it until February, 1943, more

than three months thereafter. It was therefore obviously not then being used *principally* in automobile dealer or repair shop operations so as to effect coverage when used for pleasure purposes incident to such use.

The policy was issued on the basis of an "Estimated Advance Premium" of $117.44, which was computed at stated rates on an estimated payroll of $8,000. Since Barbee testified that while he was in Richmond he would be paid no salary, it is obvious that respondent would have had to adjust the premium on the basis of an actual, rather than an estimated, payroll, and this in turn plainly entitled respondent to have its coverage under the policy limited to automobiles operated solely in connection with the insured's place of business in Auburn, or for pleasure purposes incident to such use at that location.

If, therefore, Barbee, as one of the named insured, would not have been protected under the terms of the policy from liability arising out of the operation of an automobile in Richmond, Virginia, either in connection with an "automobile dealer or repair shop" business which he or his firm might have conducted in that city, or, while operating such automobile for household or pleasure purposes therein, it seems obvious that Mrs. Barbee had no protection under the policy as an "insured" within the meaning of the "Additional Interests Endorsement" for the reason that under the "Exclusions" clause of the policy protection was afforded her only with respect to "use for pleasure purposes" when such automobile was used *principally* in connection with an automobile dealer or repair shop "purpose" at North Fifth Street, Auburn, Illinois.

Wendlinger contended in the District Court and in the Circuit Court of Appeals for the Fourth Circuit that recovery should have been had against respondent in

view of the provisions of Section 4326(a) of the Code of Virginia (commonly known as the Virginia Omnibus Insurance Law) which, it was argued, was referred to and made a part of the policy under the provisions of paragraph 6 of its "Conditions". This contention is untenable for two reasons:

1. The policy provides that the protection afforded "shall comply with the provisions of the motor vehicle financial responsibility law of any state . . . *which shall be applicable* with respect to any such liability . . .". The Virginia statute is, by its terms, applicable only to policies "issued or delivered to any person in this state." The policy sued upon was neither issued nor delivered to Ramsey and Barbee, nor to Mrs. Barbee, in the State of Virginia. It was issued and delivered to Ramsey and Barbee in the State of Illinois.

2. While Section 4326(a) of the Code of Virginia extends the coverage of any policy "issued or delivered to any person in this state" so as to protect the person injured by an automobile when operated "by any person legally using or operating the same by permission, express or implied", of the owner, it was obviously not the purpose of the statute to prevent limitation of *coverage* in the sense that the insurer might not contract as to the nature of the risks assumed, or under what circumstances they must arise, irrespective of who was operating the automobile at the time of the accident. The statute expressly provides that under the circumstances contemplated ". . . an action may be maintained by the injured person or his or her personal representative, against such corporation (the insurer) *under the terms of the policy* for the amount of the judgment in said action not exceeding the amount of the policy."

A similar New York statute was so construed in *La-*

vine v. *Indemnity Insurance Co. of North America*, 260 N. Y. 399, 183 N.E. 897, where it was said:

> "While the policy in question must be read as if it contained the extended liability clause provided for under section 109 of the Insurance Law, *it must be deemed limited* in amount *and coverage as set forth in the contract agreement*. The primary purpose of the extended liability clause contained in section 109 is to meet the defense in an action on the policy that the owner was not at the time of the accident operating the care personally or by his agent, although it was being operated by a member of his family or another with his consent, express or implied. The purpose is not to make insurance compulsory *or to prevent limitation of coverage*. *Brustein* v. *New Amsterdam Casualty Co.*, 255 N.Y. 137, 174, N.E. 304.
>
> *"The policy under consideration must be held limited in coverage to the agreement of the parties as expressed therein . . ."*

The foregoing language of the New York court in the *Lavine* Case was quoted with approval by the Circuit Court of Appeals for the Fourth Circuit in *Newton* v. *Employers Liability Assurance Corporation, supra.*

The view thus affirmed by the Circuit Court of Appeals for the Fourth Circuit was recognized in *Indemnity Insurance Company of North America* v. *Davis' Admr.* (1928), 150 Va. 778, where it was held that in an action of this nature the plaintiff "... is seeking only to enforce compliance on the part of the company *with the terms of its contract . . .*". To the same effect, see *Ellis* v. *New Amsterdam Casualty Co.* (1938), 169 Va. 620, 626, where it is stated, "In other words, the uses to which this truck may be devoted are the uses designated in the policy."

Since the policy sued upon did not, by its terms, cover pleasure uses except such as were incident to the use of the automobile for "automobile dealer or repair shop" purposes at Auburn, Illinois, the provisions of Section 4326(a) of the Virginia Code are inapplicable, and in no way extend the coverage of the policy sued upon so as to impose liability to petitioner upon the respondent.

In overruling respondent's motion to set aside the verdict of the jury and to enter up judgment in its favor, the learned Judge of the District Court stated that he had "reached the conclusion that under the facts, about which there is no dispute, the court correctly directed the jury to return a verdict for the plaintiff" (R 49).

The learned District Judge stated that "This conclusion is sustained by the following cases: *Newton* v. *Employers Liability Assurance Corporation*, 107 Fed. (2d) 164; *Constitution Indemnity Company* v. *Lane*, 67 Fed. (2d) 433; *Georgia Casualty Company* v. *Waldman*, 53 Fed. (2d) 24."

As already shown, the *Newton* case involved a determination of the question whether under Section 4326(a) of the Code of Virginia an insurance company was liable for injuries inflicted upon a third person other than the insured, and under circumstances for which the owner would not be held responsible; and the Circuit Court of Appeals for the Fourth Circuit held that the language of the statute was broad enough to impose such liability if the automobile was being operated by such third person with the permission, express or implied, of the owner, although the owner would not have been liable under the circumstances.

In the *Lane* Case the automobile which injured the plaintiff was being operated by the insured's employee in connection with the conduct of an indoor golf course, operated by the insured *in the same building* in which he

conducted an "auto repair garage", and it was held that since the policy insured against the operation of an automobile "for any and all business purposes" the defendant was liable, although the plaintiff was injured while the automobile in question was being operated to procure food, a portion of which was to be made into sandwiches and sold to the patrons of the golf course.

In the *Waldman* Case the question primarily involved was whether the automobile which injured the plaintiff was being operated by a third person without the insured's consent. The Circuit Court of Appeals for the Fifth Circuit held that the findings of the District Court on this issue were supported by the facts.

V.

CONCLUSION

The record in this case presents no conflict of facts upon which its decision depended, and the case presents no unique feature or principle of general interest which has not been settled. For the reasons hereinbefore stated, the respondent submits that the judgment of the Circuit Court of Appeals for the Fourth Circuit is in entire accord and harmony with the decisions of the Supreme Court of the United States, and therefore that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Richmond, Virginia,
April 6, 1945.